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13 **IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
14 **OAKLAND DIVISION**

15 In re )  
HEXCEL CORPORATION, )  
16 Debtor. )

Case No. 93-48535 T  
Chapter 11

17 )  
HEXCEL CORPORATION )  
18 Plaintiff, )  
19 v. )  
20 NEW JERSEY DEPARTMENT OF )  
21 ENVIRONMENTAL PROTECTION, and )  
22 UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY, )  
23 Defendants. )

Adv. Pro. 04 4246

**DEFENDANT UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY'S NOTICE OF MOTION  
AND MOTION FOR JUDGMENT ON  
THE PLEADINGS; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION**

Date: February 17, 2005  
Time: 2:00 pm  
Crtrm: 201, Judge Tchaikovsky

DEFENDANT UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY'S NOTICE OF MOTION AND  
MOTION FOR JUDGMENT ON THE PLEADINGS

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	3
NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS .....	6
MEMORANDUM OF POINTS AND AUTHORITIES .....	7
ISSUE TO BE DECIDED .....	7
STATUTORY AND REGULATORY BACKGROUND .....	7
UNDISPUTED FACTS .....	10
LEGAL ARGUMENT .....	12
I.    LEGAL STANDARD .....	12
II.   THE COMPLAINT SHOULD BE DISMISSED BECAUSE AN ENFORCEMENT ACTION AGAINST HEXCEL UNDER SECTION 106 OR 107 HAS NOT BEEN INITIATED .....	13
III.  HEXCEL'S PETITION IS A CHALLENGE TO A REMOVAL ACTION SELECTED UNDER SECTION 104 OF CERCLA .....	16
CONCLUSION .....	20

## TABLE OF AUTHORITIES

### CASES

Barnet v. Reilly, 927 F.2d 289 (6th Cir. 1991) .....	13, 14
Beck v. Atlantic Richfield Co., 62 F.3d 1240 (9th Cir. 1995) .....	19
Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991) .....	7
Carmen v. San Francisco Unified School District, 982 F.Supp 1396 (N.D. Cal. 1997) .....	12
Colorado v. United States Department of the Interior, 880 F.2d 481 (D.C. Cir. 1989) .....	7
Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930 (8th Cir. 1995) .....	7
Durfrey v. E.I. Dupont de Nemours Co., 59 F.3d 121 (9th Cir. 1995) .....	18
Fairchild Semiconductor v. U.S. E.P.A., 769 F.Supp 1553 (N.D.C.A.1991) .....	18
Federal Deposit Insurance Corporation ("FDIC") v. Jackson-Shaw Partners No. 45, LTD et al., 1995 WL 594866 (N.D.C.A. October 4, 1995) .....	19
Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency, 189 F.3d 828 (9th Cir. 2000) .....	18
Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469 (9th Cir. 1995) .....	17
Hexcel Corp. v. Stepan Co., 239 B.R. 564 (N.D.C.A. 1999) .....	10
In re Bell Petroleum Servs., Inc., 3 F.3d 889 (5th Cir. 1993) .....	7
In re Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991) .....	11
In re Combustion Equip. Assoc., Inc., 838 F.2d 35 (2d Cir. 1988) .....	14
In re Jensen, 995 F.2d 925 (9th Cir. 1993) .....	10
In re National Gypsum Co., 139 B.R. 397 (N.D. Tex. 1992) .....	10, 15
In re Torwico Elec., Inc., 8 F.3d 146 (3d Cir. 1993) .....	11

1	McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325 (9th Cir. 1995) . . . . .	10, 17, 18
2	McGlinchy v. Shell Chemical Co., 845 F.2d 802 (9th Cir. 1988) . . . . .	12
3	McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936) . . . . .	12
4	Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) . . . . .	7
5	Powerlab, Inc. v. United States Environmental Protection Agency, 184 B.R. 511 (N.D. Tex. 1995) . . . . .	15
6	Razore v. Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir. 1995) . . . . .	17, 18
7	United States v. Bestfoods, 524 U.S. 51 (1998) . . . . .	7
8	Voluntary Purchasing Groups v. Reilly, 889 F.2d 1380 (5th Cir. 1989) . . . . .	10, 13, 14

## STATUTES

11	42 U.S.C. § 9601 . . . . .	16, 17
12	42 U.S.C. § 9604 (a), (b) . . . . .	8, 9, 16, 17, 19
13	42 U.S.C. § 9606 (a) . . . . .	8, 11, 16
14	42 U.S.C. § 9607 (a) . . . . .	8, 9, 11, 16
15	42 U.S.C. § 9613 (h), (k) . . . . .	7, 8, 10, 11, 13, 16, 17, 20
16	42 U.S.C. § 9620 . . . . .	19

## RULES

19	Fed. R. Bank. 7012 . . . . .	6
20	Fed. R. Civ. P. 12(c) . . . . .	6, 12
21	Fed. R. Civ. Pro. 8(a) . . . . .	12

1 L.R. 7007-1 ..... 6

2 L.R. 9013-1 ..... 6

3  
4 REGULATIONS

5 40 C.F.R. § 1.7 ..... 10

6 40 C.F.R. §300.430 (e), (f) ..... 9

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**NOTICE OF MOTION AND**  
**MOTION FOR JUDGMENT ON THE PLEADINGS**

PLEASE TAKE NOTICE THAT Defendant United States Environmental Protection Agency, hereby moves, pursuant to Fed. R. Civ. P. 12(c) and Fed. R. Bank. 7012 and L.R. 7007-1 and 9013-1, for a judgment on the pleadings dismissing Plaintiff's claims in their entirety. This motion is based on this Notice, the attached Memorandum of Points and Authorities, and the Complaint filed by the Plaintiff on July 30, 2004. The hearing on this motion shall be on February 17, 2005, at 2:00 p.m., before the Honorable Leslie Tchaikovsky, United States Bankruptcy Judge, in Courtroom 201, United States Bankruptcy Court, 1300 Clay Street, Oakland, California.

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**MEMORANDUM OF POINTS AND AUTHORITIES**  
**ISSUE TO BE DECIDED**

Hexcel Corporation, ("Hexcel"), filed this adversary proceeding against the New Jersey Department of Environmental Protection ("NJDEP") and against the United States Environmental Protection Agency ("EPA") on July 30, 2004. EPA now moves that the court dismiss this adversary proceeding as it pertains to EPA because the court lacks subject matter jurisdiction pursuant to § 113(h) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. § 9613(h).

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**STATUTORY AND REGULATORY BACKGROUND**

Congress enacted CERCLA in 1980 in response to serious public health threats posed by abandoned or inactive hazardous waste disposal facilities. See generally United States v. Bestfoods, 524 U.S. 51, 55 (1998); Colorado v. United States Department of the Interior, 880 F.2d 481, 483 (D.C. Cir. 1989). CERCLA's primary objectives are to ensure "the prompt clean-up of hazardous waste sites," In re Bell Petroleum Servs., Inc., 3 F.3d 889, 894 (5th Cir. 1993), and to place the cost of that cleanup "on those responsible for the hazardous condition." Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995); see Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989). To effectuate these purposes, Congress established a framework to give EPA authority to address contaminated sites without waiting for judicial review of issues relating to liability or the adequacy of the cleanup remedy. Boarhead Corp. v. Erickson, 923 F.2d 1011, 1019 (3d Cir. 1991) (Congress

1 designed CERCLA to provide EPA with "the authority and the funds necessary to respond  
2 expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or  
3 during the hazard clean-up.")

4 CERCLA provides EPA with several statutory tools to address hazardous waste sites. For  
5 example, under Section 106(a) of CERCLA, EPA can seek performance of a cleanup by a potentially  
6 responsible party, either through issuance of an administrative order directing the performance of  
7 a cleanup or by seeking judicial injunctive relief. 42 U.S.C. § 9606(a). Under CERCLA Section  
8 104, 42 U.S.C. § 9604, EPA can also undertake response actions to clean up a site using funds from  
9 the Superfund, and then seek to recover its costs from "responsible parties" under CERCLA Section  
10 107. 42 U.S.C. § 9607(a)(4)(A).<sup>1</sup> Before an action under either Section 106 or 107 occurs, a  
11 number of preliminary activities generally take place.<sup>2</sup>

12 The exchange between EPA and parties who are potentially liable for contamination at a site  
13 often begins when EPA notifies them, usually by letter, that EPA considers them to be potentially  
14 responsible, and sometimes asks them to reimburse EPA's response costs at a Site or to undertake  
15 a particular response activity at the Site. 42 U.S.C. §9613(k)(2)(D).<sup>3</sup> This letter is called a "General  
16 Notice Letter". In this case, the General Notice Letter asks Hexcel to participate with other PRPs

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17  
18 <sup>1</sup>CERCLA Section 107(a) imposes strict liability on four classes of "responsible parties," which,  
19 in general, include present owners and operators of facilities, certain former owners and operators of  
20 facilities, parties who arranged for the treatment or disposal of hazardous substances, and certain  
21 transporters of hazardous substances. 42 U.S.C. § 9607(a).

22 <sup>2</sup>EPA has not yet decided which kind of judicial action, if any, it will file against Hexcel with  
23 respect to the Site.

<sup>3</sup>Those who may be liable for the cleanup under CERCLA are known as "potentially responsible  
parties." ("PRPs").



1 in funding a remedial investigation and feasibility study, ("RI/FS"). See Compl. ¶ 25.

2 During an RI/FS, the site is investigated, and issues pertaining to the source and nature of  
3 contaminants are addressed. 42 U.S.C. § 9604(a). In addition, various remedial alternatives are  
4 developed. Id. The RI/FS may be undertaken by EPA or by PRPs, if they are qualified to do so. Id.  
5 If EPA performs the RI/FS, the United States, on behalf of EPA, may initiate a judicial action to  
6 recover its costs pursuant to CERCLA Section 107, 42 U.S.C. § 9607. The information garnered  
7 through this study is used by EPA for its selection of the appropriate remedy. See 40 C.F.R.  
8 §300.430(e)(7). After public comments on a proposed plan for remedial action at a site are  
9 considered, EPA selects a remedy in a Record of Decision ("ROD"). 40 C.F.R. §§300.430(f)(4) and  
10 (f)(6).

11 In addition to its cleanup and liability scheme, CERCLA contains detailed provisions  
12 governing the timing of review. In order to ensure that judicial actions cannot delay the cleanup of  
13 sites, CERCLA Section 113(h) specifically provides that:

14 TIMING OF REVIEW – No Federal court shall have jurisdiction under Federal law.  
15 . . . or under State law which is applicable or relevant and appropriate. . . to review any  
16 challenges to removal or remedial action selected under Section 9604 of this title, or  
to review any order issued under Section 9606(a) of this title, in any action except  
one of the following:

17 (1) An action under Section 9607 of this title to recover response costs or damages  
or for contribution.

18 (2) An action to enforce an order issued under Section 9606(a) of this title or to  
19 recover a penalty for violation of such order.

20 (3) An action for reimbursement under Section 9606(b)(2) of this title.

21 (4) An action under Section 9659 of this title (relating to citizen suits) alleging that  
22 the removal or remedial action taken under Section 9604 of this title or secured under

1 Section 9606 of this title was in violation of any requirement of this chapter. Such  
2 an action may not be brought with regard to a removal where a remedial action is to  
be undertaken at the site.

3 (5) An action under Section 9606 of this title in which the United States has moved  
4 to compel a remedial action.

5 42 U.S.C. § 9613(h).

6 Section 113(h) thus defers judicial review until one of the enumerated exceptions is satisfied.  
7 McClellan Ecological Seepage Situation ("MESS") v. Perry, 47 F.3d 325, 328 (9th Cir. 1995). Pre-  
8 enforcement review of liability is included among the actions barred by Section 113(h). Voluntary  
9 Purchasing Groups v. Reilly, 889 F.2d 1380, 1389 - 90 (5th Cir. 1989). Section 113(h) is fully  
10 applicable in bankruptcy proceedings. See In re National Gypsum Co., 139 B.R. 397, 411 (N.D.  
11 Tex. 1992). The declaratory action filed by Hexcel is not one of the enumerated exceptions in  
12 Section 113(h), and therefore this action should be dismissed because the court is without  
13 jurisdiction over Hexcel's claims.

#### 14 **UNDISPUTED FACTS**

15  
16 On December 6, 1993, Hexcel filed a voluntary petition for relief under the provisions of  
17 Chapter 11 of the US Bankruptcy Code. Complaint ("Compl.") at ¶ 7. Hexcel notified EPA Region  
18 II of commencement of the bankruptcy, and of the bar date for filing proofs of claim. Compl. ¶¶ 8  
19  
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1 and 10.<sup>4</sup> EPA did not file a proof of claim against Hexcel.<sup>5</sup> Compl. ¶ 18. The court confirmed  
2 Hexcel's plan of reorganization ("Confirmation Order") on January 12, 1995. Compl. ¶ 19. Several  
3 years thereafter, EPA sent a General Notice of Potential Liability under CERCLA ("Notice letter"),  
4 to Hexcel and 41 other companies that EPA believes to be potentially responsible for contamination  
5 of the Lower Passaic River Study Area portion of the Diamond Alkali Superfund Site ("Site").  
6 Compl. ¶ 25. Hexcel's Complaint does not allege that at any time EPA has filed any action against  
7 Hexcel under Sections 107 or 106 of CERCLA, 42 U.S.C. § 9607 or 9606 to recover response costs  
8 or to compel Hexcel to perform a remedial action. See generally, Complaint. Indeed, EPA has not  
9 brought any judicial action against Hexcel with respect to this Site.

10 Hexcel asks for a declaration that provides that EPA's claims as set forth in the Notice letter  
11 are "forever discharged;" that directs EPA to "remove or dismiss Hexcel from the [Notice letter] or  
12 any proceeding initiated by EPA to enforce the [Notice letter]"; and enjoins EPA "from commencing  
13 or continuing any action to recover . . . those claims against Hexcel set forth in the [Notice letter]."  
14 Compl. at 9, ("Prayer for Relief").

15 The United States on behalf of EPA submits that, pursuant to Section 113(h) of CERCLA,  
16 42 U.S.C. § 9613(h), the court does not have subject matter jurisdiction to hear this adversary  
17 proceeding because this is a challenge to a removal action that does not fall within one of Section

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18 <sup>4</sup> EPA Region II includes New Jersey, New York, Puerto Rico and the U.S. Virgin Islands. 40  
19 C.F.R. § 1.7.

20 <sup>5</sup>EPA is not required to file a proof of claim for claims that have not yet arisen, see In re Jensen,  
21 995 F.2d 925, 930 (9th Cir. 1993); Hexcel Corp. v. Stepan Co., 239 B.R. 564, 570 (N.D.C.A. 1999); nor  
22 for non-dischargeable obligations that are not within the meaning of "claim" pursuant to 11 U.S.C. §  
23 101(5). In re Torwico Elec., Inc., 8 F.3d 146, 151 (3d Cir. 1993); In re Chateaugay Corp., 944 F.2d 997,  
1008 (2d Cir. 1991).

1 113(h)'s exceptions. In the future, should the United States on behalf of EPA bring an enforcement  
2 action against Hexcel under Section 106 (to perform work); or 107 (to pay for work performed by  
3 EPA), the bar may no longer apply. 42 U.S.C. § 9613(h)(1) and (2). At this time, however Hexcel  
4 does not allege that the requisite enforcement action has been initiated against Hexcel. See  
5 generally, Complaint. Accordingly, the exceptions to Section 113(h) have not been met and the  
6 court should dismiss this adversary proceeding.<sup>6</sup>

## 7 8 LEGAL ARGUMENT

### 9 I. LEGAL STANDARD

10 Judgment on the pleadings under Fed. R. Civ. Pro. 12(c) is proper when taking all the  
11 allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law.<sup>7</sup> See  
12 Fed. R. Civ. Pro. 12(c); McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988);  
13 Carmen v. San Francisco Unified School District, 982 F.Supp 1396, 1400 (N.D. Cal. 1997). The  
14 court must accept all material allegations in the complaint as true and must construe the complaint  
15 in the light most favorable to Hexcel. See McGlinchy, 845 F.2d at 810. For the purposes of this  
16 Motion, EPA does not dispute any material facts as asserted by Hexcel in the Complaint are true.<sup>8</sup>

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17  
18 <sup>6</sup>Hexcel is not entitled to any of the relief it seeks. The United States, on behalf of EPA, reserves  
19 the right to address Hexcel's claims substantively at a later time as appropriate.

20 <sup>7</sup>EPA expressly denies certain allegations as set forth in its Answer filed with the Court on  
21 September 1, 2004. However, for the purposes of this Motion, the court may assume all material  
22 allegations as set forth in the Complaint are true.

23 <sup>8</sup> Hexcel bears the burden of establishing federal jurisdiction in its complaint. See Fed. R. Civ.  
Pro. 8(a); see McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182 -83 (1936) (fundamental

1 Accordingly, the only inquiry for the court at this time is whether the United States, on behalf of  
2 EPA, is entitled to judgment as a matter of law. See Fed. R. Civ. P. 12(c).

3 **II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE AN ENFORCEMENT**  
4 **ACTION AGAINST HEXCEL UNDER SECTION 106 OR 107 HAS NOT BEEN**  
5 **INITIATED**

6 Section 113(h) of CERCLA limits a court's authority to hear a challenge to EPA's activities  
7 under CERCLA unless or until certain enumerated exceptions are met. 42 U.S.C. § 9613(h). Pre-  
8 enforcement judicial review is "judicial review of EPA actions prior to the time that EPA or a third  
9 party undertakes a legal action to enforce an order or to seek recovery of costs for the cleanup of a  
10 hazardous waste site." Barnet v. Reilly, 927 F.2d 289, 295 (6th Cir. 1991) quoting Reardon v.  
11 United States, 922 F.2d 28, 30 n. 4 (1st Cir. 1990). Pre-enforcement review of liability does not  
12 fall into one of the exceptions and is thus included among the actions barred by Section 113(h).  
13 Voluntary Purchasing Groups v. Reilly, 889 F.2d 1380, 1387-89 (5th Cir. 1989).<sup>9</sup>

14 In Voluntary Purchasing, the Fifth Circuit established that Section 113(h) bars a suit seeking  
15 a pre-enforcement determination of liability to EPA under CERCLA. 889 F.2d at 1389-90. The  
16 court dismissed a complaint seeking a declaratory judgment of nonliability filed by a potentially  
17 responsible party that had received a notice letter. Id. The court carefully analyzed both the statutory  
18 language and the legislative history, as well as the relevant case law, and determined that potentially  
19 responsible parties cannot seek judicial resolution of CERCLA liability until EPA initiates an

20 that a party seeking relief must demonstrate a basis for federal jurisdiction).

21 <sup>9</sup> This is not a citizen's suit under 42 U.S.C. § 9659 as provided by 113(h)(4), 42 U.S.C.  
22 9613(h)(4).

1 enforcement action. See id.

2 As the court explained, Congress imposed the restrictions on jurisdiction established by  
3 Section 113(h) to ensure that EPA was not compelled to divert its resources to the defense of actions  
4 seeking to establish the nonliability of different parties. Id. at 1390. The court emphasized that  
5 allowing such actions would interfere with EPA's ability to appropriately allocate its limited  
6 resources by compelling the agency to expend resources defending a "crazy quilt" of litigation  
7 throughout the country. Id. The court concluded that this outcome "would be incompatible with the  
8 design of CERCLA and the discretion granted to the EPA." Id. Therefore, the court concluded that  
9 Congress had enacted Section 113(h) to preclude such litigation until EPA initiates the requisite  
10 enforcement action. Id.

11 Similarly, in Barnet v. Reilly, 927 F.3d at 295, the 6th Circuit found that the bar to pre-  
12 enforcement review is not lowered by the issuance of a notice letter by EPA. In Barnet, an  
13 aluminum recycling plant disposed of dross in a landfill. EPA sent Barnet a notice letter pertaining  
14 to its potential liability and seeking participation in the funding of an RI/FS. Id. at 290. Barnet  
15 sought declaratory judgment on the constitutionality of CERCLA's statutory scheme. In finding that  
16 such an inquiry would amount to pre-enforcement review, the court emphasized that identifying a  
17 party as a PRP through a notice letter does not mean that EPA would ever decide to file suit against  
18 that party. Id. According to the court, "[f]orcing EPA to litigate prior to its decision to sue, simply  
19 wasted EPA's limited resources." Id. at 295.<sup>10</sup> The court noted that Congress enacted Section

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20 <sup>10</sup> In In re Combustion Equip. Assoc., Inc., 838 F.2d 35 (2d Cir. 1988), the court affirmed the  
21 dismissal of an adversary proceeding seeking an order that potential CERCLA liability had been  
22 discharged on the ground that the claim was unripe. Id. at 39-40. Although the court did not consider the  
application of Section 113(h), the Second Circuit did hold that the issuance of a notice letter to a PRP did



1 113(h) specifically to avoid such wasteful litigation and accordingly upheld the district court's  
2 decision to dismiss the action. Id.

3 Requiring EPA to defend adversary proceedings in bankruptcy courts where no enforcement  
4 action has been initiated would have the same outcome -- EPA's deployment of its resources would  
5 be dictated by the necessity of defending adversary proceedings, rather than as EPA concluded such  
6 resources would be best spent. In Powerlab, Inc. v. United States Environmental Protection Agency,  
7 184 B.R. 511, 513 (N.D. Tex. 1995), for example, the court found that Section 113(h) deprived the  
8 court of subject matter jurisdiction under circumstances similar to those currently before the court.  
9 A Chapter 11 debtor, Powerlab, informed a number of EPA regional offices that it had commenced  
10 reorganization proceedings. Id. As in the instant case, EPA did not file a proof of claim, but after  
11 the court issued its confirmation order, EPA did send a notice letter informing Powerlab of its  
12 potential liability at a Superfund Site. As in this case, the notice letter requested funding for an  
13 RI/FS Id.; Compl ¶ 25. Powerlab filed an adversary proceeding in the bankruptcy court seeking a  
14 declaration that any debt owed to EPA for the site had been discharged through its bankruptcy. Id.  
15 at 513. The court reasoned that because, at base, the suit was one to determine whether Powerlab  
16 was liable for cleanup costs, it was a "challenge" that was barred by Section 113(h). Because no  
17 proof of claim was filed with the court, no exception applied.<sup>11</sup> Id. The court's reasoning applies

18  
19 not trigger jurisdiction for judicial review of the PRP's liability to EPA in light of a prior bankruptcy. It  
20 concluded that a notice letter to a PRP was "not a final definitive ruling with the status of law demanding  
immediate compliance since it does not impose liability. Id. at 38. The court noted that the PRPs were  
only "potentially" liable and that more than 190 had been sent notices. Id. at 40.

21 <sup>11</sup>Compare In re National Gypsum Co., where EPA had filed a proof of claim and the court  
22 concluded that when the code and CERCLA are read together, this filing should be considered "an  
enforcement or cost-recovery measure" that would fall within the specific exceptions to the jurisdictional

1 equally well here, given the evident similarities between this case and Powerlab. Accordingly, like  
2 the proceeding in Powerlab, this action is barred by Section 113(h).

3 Thus as long as EPA has not filed a proof of claim or any enforcement action against Hexcel,  
4 this adversary proceeding calls for impermissible pre-enforcement review. See 42 U.S.C. § 9613(h).  
5 If, in the future, EPA brings an action pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a)  
6 to recover costs of cleanup from Hexcel, or an action pursuant to Section 106(a) of CERCLA, 42  
7 U.S.C. § 9606(a), to compel Hexcel to undertake work at the Site, then Section 113(h) may no  
8 longer bar Hexcel's petition. See 42 U.S.C. § 9613(h)(1) and (5).

9  
10 **III. HEXCEL'S PETITION IS A CHALLENGE TO A REMOVAL ACTION**  
**SELECTED UNDER SECTION 104 OF CERCLA**

11 Hexcel's petition challenges a "removal or remedial action selected under Section 9604 of  
12 [CERCLA]" 42 U.S.C. § 9613(h), and is barred by Section 113(h). Hexcel challenges the issuance  
13 of a notice letter asking for the funding of an RI/FS. An RI/FS is a removal action selected under  
14 Section 104, and therefore Hexcel's challenge falls within the jurisdictional bar of the statute. See  
15 42 U.S.C. § 9604.

16 CERCLA contemplates two types of environmental cleanup actions: "removal" and  
17 "remedial" actions. "Removal actions" include a variety of actions taken to study, cleanup and  
18 otherwise "taking such other actions as may be necessary to prevent, minimize, or mitigate damage  
19 to the public health or welfare or the environment." 42 U.S.C. §9601(23). "Remedial actions" are

20  
21 ban of Section 113(h). 139 B.R. at 411. In the present case, however, the United States, on behalf of  
22 EPA, has not filed a proof of claim or any other judicial action against Hexcel. Therefore the holding in  
National Gypsum is inapposite.



1 those that are “consistent with [a] permanent remedy” to the contamination problem and “taken  
2 instead of or in addition to removal actions.” Id. § 9601(24). Removal and remedial actions  
3 encompass a broad range of activities, including, for example, enforcement activities, site  
4 investigation, monitoring and evaluation, testing, and actions taken to prevent or abate the release  
5 or threatened release of hazardous substances from a site. Id. § 9601 (23) and (24). Collectively,  
6 these actions are called “response actions.” Id. § 9601(25). Response actions expressly include  
7 enforcement activities related to removal and remedial activities. Id. § 9601(25).

8 Under Section 104, EPA may undertake an investigation “to identify the existence and extent  
9 of the release or threat of release, the source and nature of the hazardous substances, pollutants or  
10 contaminants involved, and the extent of danger to the public health or welfare or to the  
11 environment.” 42 U.S.C. § 9604(b). In addition, Section 104 authorizes EPA “to undertake such  
12 planning legal, fiscal, economic, engineering, architectural and other studies or investigations as may  
13 be necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to  
14 enforce the provisions of [CERCLA]”. 42 U.S.C. § 9604(b) (emphasis added). In particular, Section  
15 104(a) describes in detail the authority of EPA to conduct and/or to ascertain whether a PRP is  
16 qualified to conduct an RI/FS. 42 U.S.C. § 9604(a). Thus, EPA’s general notice letter in this case  
17 seeking funding for the RI/FS at the Site is a response action selected under Section 104 of  
18 CERCLA. See Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 239 (9th Cir. 1995) citing  
19 South Macomb Disposal Auth. v. EPA, 681 F.Supp 1244, 1246 (E.D. Mich. 1988) stating “[i]t is  
20 clear. . . that a RI/FS taken by the EPA is a “removal action within the meaning of the statute.”

21 Once it is determined that there is a response action, the court must next determine whether

1 the action brought by Hexcel challenges the response action. 42 U.S.C. § 9613(h). A lawsuit is a  
2 “challenge to the removal or remedial action” for the purposes of Section 113(h) if it “relates to the  
3 goals of the cleanup.” MESS, 47 F.3d at 329. A broad range of challenges fall within this definition.  
4 See Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469, 1481 (9th Cir. 1995) (a  
5 challenge to medical monitoring by a government agency at a Superfund Site falls within the  
6 definition of “relating to the goals of cleanup.”) The challenges may be brought under statutes other  
7 than CERCLA. See, e.g., MESS, 47 F.3d at 329, and Razore, 66 F.3d at 239 (both present  
8 challenges under Clean Water Act (“CWA”) and Resource Conservation and Recovery Act  
9 (“RCRA”) to response actions). Accordingly, Hexcel’s challenge to EPA’s response action under  
10 the Bankruptcy Code falls under the definition of challenge for the purposes of Section 113(h).

11 In Fairchild Semiconductor, 769 F.Supp 1553 at 1561, the court quotes the legislative history  
12 of Section 113(h) to describe the breadth of circumstances under which an impermissible pre-  
13 enforcement challenge would be found. Quoting Senator Thurmond, the court stated, “[Section  
14 113(h)] covers all lawsuits, under any authority, concerning the response actions that are performed  
15 by EPA and other Federal Agencies, by States pursuant to a cooperation agreement, and by private  
16 parties pursuant to an agreement with the Federal Government. The Section also covers all issues  
17 that could be construed as a challenge to the response, and limits those challenges to the  
18 opportunities specifically set forth in the Section.” Fairchild Semiconductor, 769 F.Supp at 1561,  
19 quoting 132 Cong. Rec. 28,441 (1986) (emphasis added). Thus, a proceeding that relates to the  
20 response action will be barred under Section 113(h).

21 The cases in which the 9th Circuit declined to apply the bar of Section 113(h) are

1 distinguishable from the present case. In Durfrey v. E.I. Dupont de Nemours Co., 59 F.3d 121, 126  
2 (9th Cir. 1995), citizens demanded private medical monitoring at a Superfund Site. 59 F.3d at 126.  
3 Private medical monitoring (unlike activities pertaining to an RI/FS) do not fall under the definition  
4 of a response action. In Fort Ord Toxics Project, Inc. v. California Environmental Protection  
5 Agency, 189 F.3d 828, 834 (9th Cir. 2000), the site was located at a federal facility (unlike the Site  
6 in the present action) and the remedial action was therefore authorized under CERCLA § 120, 42  
7 U.S.C. § 9620, not under CERCLA § 104, 42 U.S.C. § 9604. Finally, in both Federal Deposit  
8 Insurance Corporation (“FDIC”) v. Jackson-Shaw Partners No. 45, LTD et al., 1995 WL 594866 at  
9 \*3 (N.D.C.A. October 4, 1995); and Beck v. Atlantic Richfield Co., 62 F.3d 1240, 1243 (9th Cir.  
10 1995), the plaintiffs asserted state-law claims for damages against private parties. Here, Hexcel has  
11 sued EPA expressly to enjoin its activities under CERCLA. Thus, Hexcel’s challenge is  
12 distinguishable from the cases in which the 9th Circuit found that Section 113(h) did not apply.

13 As discussed more fully above, EPA has undertaken a response action under Section 104 of  
14 CERCLA by deciding to initiate an RI/FS, identifying PRPs, forwarding notice letters and seeking  
15 to recover costs of the RI/FS. See 42 U.S.C. § 9604; Compl. at 25. Hexcel’s action is an express  
16 challenge to this response action. See Compl. at 9, (Prayer for Relief). Hexcel asks for a declaration  
17 that provides that EPA’s claims as set forth in the Notice letter are “forever discharged;” that directs  
18 EPA to “remove or dismiss Hexcel from the [Notice letter] or any proceeding initiated by EPA to  
19 enforce the [Notice letter]”; and enjoining EPA “from commencing or continuing any action to  
20 recover . . . those claims against Hexcel set forth in the [Notice letter].” Id. This adversary  
21 proceeding is expressly designed to challenge the Notice letter and EPA’s ability to identify and

1 proceed against Hexcel as a PRP. See id. It is thus a challenge to EPA's response action and is  
2 barred under Section 113(h) at this time. Upon the United States' initiation of an action under  
3 CERCLA Sections 106 or 107 on behalf of EPA, Hexcel may raise a defense that any obligations  
4 it may have pertaining to the Site were discharged in bankruptcy. However, until that time, Hexcel  
5 is barred from pursuing judicial relief on that issue.

1 CONCLUSION

2 For the reasons set forth above, the court lacks subject matter jurisdiction over Hexcel's  
3 petition at this time pursuant to Section 113(h) of CERCLA, 42 U.S.C. § 9613(h). Accordingly,  
4 EPA is entitled to judgment as a matter of law.  
5

6 Respectfully Submitted,

7  
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1 CERTIFICATE OF SERVICE

2 I, TINA LOUIE, declare:

3 That I am a citizen of the United States and employed in the City and County of San  
4 Francisco, California; that my business address is United States Attorney's Office, 450 Golden Gate  
5 Avenue, 10<sup>th</sup> Floor, San Francisco, California 94102; that I am over the age of eighteen years; and  
6 that I am not a party of the above-entitled action;

7 That on November 29, 2004 I deposited in the United States mails, in an envelope bearing the  
8 requisite postage, a copy of:

9 **Defendant United States Environmental Protection**  
10 **Agency's Notice of Motion and Motion for Judgment on**  
11 **The Pleadings; Memorandum of Points and Authorities in Support of Motion**

12 addressed to:

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at their last known addresses at which place there is service by United States mail.

This Certificate is executed on November 29, 2004, at San Francisco, California.

I certify under penalty of perjury that the foregoing is true and correct.

  
TINA LOUIE  
Contract Legal Clerk